IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS--SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 00-30018
	)	
MICHAEL SWANSON,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Now before the Court is the Defendant's Motion to Suppress Evidence (d/e 53). The motion is fully briefed, and pursuant to Local Rule 72.1, the District Judge has referred the matter to me for a Report and Recommendation. After carefully considering all of the submissions of the parties, hearing evidence on the matter, and pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the Motion to Suppress be denied.

I. BACKGROUND

The Defendant is charged with bank robbery by force or violence, pursuant to 18 U.S.C. § 2113(a), (d). The robbery occurred at approximately 9:00 a.m. on January 6, 2000 at Citizen's National Bank in Bunker Hill, Illinois. Alton Police Officers stopped a vehicle driven by the

Defendant at 10:55 a.m. for several traffic violations and a suspicion that the vehicle's occupants may have been involved with the robbery. The Defendant driver and two occupants of the vehicle were detained at the site of the traffic stop and later transported to the Alton Police Station. Once at the station, they were questioned by law enforcement. The Defendant received three traffic citations. A grand jury subpoena was issued for the Defendant and he complied with the subpoena's request to submit samples of hair, saliva, fingerprints, and a picture.

The Defendant claims that the evidence collected through the grand jury subpoena and statements made to the FBI during questioning were illegally obtained because the police lacked sufficient reasonable suspicion to detain the Defendant, because the police lacked probable cause to arrest the Defendant, because the grand jury subpoena was issued without supervision and allowed the Defendant's compliance with the subpoena at a location outside the grand jury room, and because the intrusive collection of samples from the Defendant through the subpoena violated Defendant's Fourth Amendment rights.

The Government argues that law enforcement had probable cause to stop the vehicle, and based on the totality of the information known about

the bank robbery, had reasonable suspicion to do a pat down search and to detain Defendant for further investigation. The Government asserts that probable cause to arrest the Defendant perfected at the traffic stop scene. The Government asserts that the grand jury subpoena was valid, that the collection of saliva samples through the subpoena was appropriate, or the evidence is protected under the inevitable discovery doctrine.

II. FACTS

On January 6, 2000 at approximately 9:10 a.m. the Citizens National Bank in Bunker Hill, Illinois was robbed by two black males. According to FBI interviews of bank employees, both robbers wore gloves and either ski masks or knit stocking caps covering their faces. The employees estimated that robbers were 5'9" to 5'10" tall. One robber wore a dark colored coat, dark pants, and black shoes; the other robber wore light colored sneakers. An object resembling a weapon was used and discharged during the robbery. One of the robbers jumped over the teller counter, leaving a shoe print, which was retrieved by the FBI. The robbers took approximately $2,800 in cash from the bank.

Witnesses outside the bank told the FBI that they saw two black males enter and exit the bank. Both wore dark head coverings and had

long coats, one of which was dark in color. The witnesses described the height of both robbers as being between 5'9" and 6'0" tall. One witness saw the men run into an alley and enter a maroon colored, mid-sized, four-door, Chrysler or Plymouth car from the late 1980s, with four headlights.

At 9:27 a.m. an ISPERN broadcast stated that the bank had been robbed. It also provided the following information: “small maroon vehicle, two black males, blank shots fired.” Several witnesses testified about a second ISPERN broadcast, giving a more detailed description of the vehicle and the suspects’ clothing and height. No written document concerning the second broadcast, however, has been presented to the Court.

At 10:55 a.m., aware of the ISPERN broadcast, Alton police officers observed a 1980's vintage maroon car occupied by three black males. The officers noticed a broken windshield and also determined the registration was expired on the vehicle before they stopped the car. The officers determined that Defendant Michael Swanson was the driver and that his license was expired and that the car was uninsured. All occupants of the vehicle gave addresses of Royal Lakes, a neighboring town of Bunker Hill, Illinois. After Alton Police Officer David Hayes arrived at the scene, he

decided that a pat down of the occupants should be done for officers' safety. Hayes testified that he made this decision out of concern for the safety of the police officers based on the general match of description of the car and its occupants with the bank robbery suspects (maroon, 1980's vintage, mid-size car, four headlights, black males about 5'9"-5'10" tall, wearing dark clothing, all listing addresses from the vicinity of the bank robbery). In addition, Hayes knew Defendant Michael Swanson from a previous investigation of a shooting.

The three occupants were asked to get out of the car and were subjected to a pat down search by the officers. No weapons were found, however, each occupant possessed a large amount of cash. An inventory of the car was made and no weapons were found, although the officers did find a dark colored coat.

The Defendant and the two other occupants were handcuffed and placed in the rear of separate police cruisers pursuant to Alton Police Department policy. At 11:15 a.m. Detective Golicke arrived and proceeded to separately interview each of the three occupants of the vehicle. Golicke informed each person he interviewed of their Miranda rights prior to asking any questions and obtained oral waivers. Defendant Swanson reported

that he had $1500 cash on him and that the money was a result of gifts from several different females (he could not explain why he received such gifts). Defendant Swanson denied being outside of Alton on that day and specifically stated that he had not been to Royal Lakes that day prior to being stopped. Most recently, Swanson reported coming from the Alton Square Mall.

Lee'C Walton[1] told Golicke that the $600 on his person was earned from a job. Walton told Golicke he had been picked up by Swanson and Zollicoffer in Royal Lakes a couple of hours previous to the stop. At different points Walton's story changed, regarding Zollicoffer's presence and when Walton met up with Swanson.

Finally, Myron Zollicoffer told Golicke that the $280 on his person came from a job. He stated that both Swanson and Walton picked him up about an hour ago from his girlfriend's house in Alton.

At approximately 11:22 a.m. FBI agent Steven Schlobohm and Macoupin County Sheriff's Deputy Tim Lovejoy left the bank in Bunker Hill, Illinois, to meet the Alton Police and proceeded to the scene of the traffic stop. They arrived at the location of the stop at 11:55 a.m. and found

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[1] **At the scene, Lee'C Walton said his name was Anthony Carrothers. Lee'C Walton is a co-Defendant herein.**

each occupant of the vehicle in separate police cars. Schlobohm compared the witness' descriptions of the robbers with the occupants of this car and found them to be similar in stature and clothing. All three occupants were transported to the Alton Police Station.

Once at the station the FBI separately questioned each occupant. From 12:20 p.m. until 1:00 p.m. Schlobohm and Lovejoy questioned Zollicoffer. He told the officers that he had been picked-up by Swanson and Walton from his girlfriend's house in Alton between 9:30 a.m. and 10:00 a.m. From there the three of them stopped at a convenience store and went to the mall. Zollicoffer said that some of the money he had came from Swanson, who repaid money borrowed earlier from Zollicoffer.

From 1:15 p.m. until 2:00 p.m. Schlobohm and Lovejoy questioned Lee'C Walton. Walton said he spent the night in Bunker Hill and that Swanson picked him up at 10:00 a.m. Then he and Swanson stopped at a store, bought a sweatsuit, and then picked up Zollicoffer in Alton. Later he changed his story, saying they picked up Zollicoffer first and then bought the sweatsuit before going to the mall. Walton at some point began asking questions about federal prison facilities, cooperation, and then asked for a lawyer. Evidently, not hearing Walton's request for an attorney, Lovejoy

continued talking with Walton, who admitted his involvement with the Bunker Hill Bank robbery, but would not implicate his accomplice.

At 2:00 p.m. FBI agents Kathleen Adams and James Thurston questioned Defendant Michael Swanson. Swanson gave verbal permission for the agents to search the car. He was advised of his Miranda rights and Swanson agreed to talk to the agents. He stated that he had been at his home in Royal Lakes prior to picking up Walton and Zollicoffer at their homes in Royal Lakes. All three then came to Alton when they were stopped by the police. Swanson stated that they made no stops. He denied any involvement with the robbery and at 2:15 p.m. invoked his right to counsel.

A search of the car revealed a dark coat with four pockets, matching a description given by one of the witnesses. All three individuals consented to a review of their money. No serial number matches with bait bills from the bank were found, however, four of the bills were unique. One twenty dollar bill had vulgar language written on it and was identified by a bank teller later that afternoon and by a bank customer who originally brought the bill to the bank. Two bills that were badly faded and were also

identified by the bank teller. Lastly, a five dollar bill that was a unique color of bright green was also identified by the teller.

FBI agents spoke with a representative of the U.S. Attorney's Office concerning the investigation. At 6:37 p.m. federal grand jury subpoenas were issued through the U.S. Attorney's Office in Springfield. The subpoenas called for Swanson, Walton, and Zollicoffer to submit samples of head hair, body hair, hand hair, saliva, fingerprints, and photographs. The subpoenas gave each individual the option of complying by submitting samples to law enforcement, or appearing on February 2, 2000 at 9:00 a.m. before the grand jury.

All three individuals agreed to comply with the subpoena that evening and were taken to St. Anthony's Hospital for the collection of samples. Once the collection was completed, the Alton Police Department finished its processing of each person and they were released at 10:15 p.m.

Defendant Swanson received three traffic citations from the stop, operating a vehicle with expired registration sticker, driver's license not on person, and operating uninsured vehicle. Officer Hayes testified that a motor vehicle with expired registration cannot be driven and must be towed. That Defendant Swanson was "a full custody arrest" on the traffic

charges and because his driver's license was not available as bail, Swanson could only secure his release by posting currency as bond with the Clerk of the Court.

Based upon a stipulation between the parties, and dialogue with the Court, it is clear that in December of 1998, a grand jury was impaneled in Springfield. Further, that same grand jury sat on January 5, 2000 and would next sit on February 2, 2000. It was also stipulated that the grand jury itself was not involved in any aspect of the grand jury subpoenas issued January 6, 2000. The grand jury had no prior knowledge, and the grand jury gave no prior authorization to issue grand jury subpoenas to Swanson and the others.

III. ANALYSIS

Defendant has raised multiple grounds upon which he believes that the evidence obtained by the Government should be suppressed. The Court will address each argument in turn.

A. Initial Stop of Vehicle

The Defendant does not contest the validity of the initial traffic stop by the Alton Police. However, the Court believes it important to note that under Whren v. United States, 517 U.S. 806 (1996), there was probable

cause for the traffic stop, specifically the observed violation of Illinois law involving expired registration tags, the true motivation or intent of law enforcement in making the stop is immaterial.

B. Terry Stop

In the landmark case of Terry v. Ohio, 392 U.S. 1, 21-24 (1968), the Supreme Court held that law enforcement could conduct an investigative detention when they had a reasonable suspicion supported by articulable and objective facts that a crime is occurring or has occurred, and that the person questioned may have information about the crime.

The Government argues that a Terry stop did not occur until the officers conducted a pat down of the Defendant. The Government asserts that once the Terry stop began, the officers had a reasonable articulable suspicion that Defendant, and the other occupants of the car, had been engaged in criminal activity involving the bank robbery in Bunker Hill earlier that day.

The Court agrees with the Government that a Terry stop did not begin until the officers conducted a pat down of Defendant and the other occupants. Once an individual is stopped and questioned regarding traffic offenses, law enforcement may broaden their inquiry if circumstances give

rise to suspicions further criminal activity is afoot. See United States v. Finke, 85 F.3d 1275, 1280 (7th Cir. 1976). The Court must look to the totality of the circumstances in assessing the reasonableness of the further detention. Id.

In the present case, the Court believes that under the totality of the circumstances, the Alton police officers possessed a reasonable, articulable suspicion that Defendant and the other occupants had been engaged in criminal activity, and that the facts available to the officers at the time of this seizure warranted a person of reasonable caution to believe that the actions which they took were necessary and appropriate. United States v. Griffin, 150 F.3d 778, 783 (7th Cir., 1998). Officers were aware of the ISPERN dispatch concerning the bank robbery and the suspect vehicle when the officers initially observed the vehicle. The vehicle matched the description of the suspect vehicle, was occupied by black males, and was approximately 25 miles from the scene of the bank robbery.

Furthermore, once Officer Hayes arrived, law enforcement was provided with the additional information Officer Hayes had concerning Defendant Swanson from a previous investigation of a shooting. See

United States v. Wheeler, 800 F.2d 100, 103-104 (7th Cir., 1986), reversed on other grounds, United States v. Sblendorio, 830 F.2d 1382 (7th Cir., 1987) (holding that knowledge of prior criminal activity may be considered along with other factors). This information clearly supported the police actions involving the pat down for weapons, which led to the eventual locating of large quantities of U.S. currency on Defendant Swanson and the other occupants.

Based upon these facts, and the reasonable inferences drawn therefrom, law enforcement had the ability to make further inquiry. They conducted independent interviews and obtained inconsistent reports concerning the immediate past activities of the three occupants of the suspect vehicle. All of this information, the Court believes supplied law enforcement with a reasonable articulable suspicion that Defendant Swanson and the others had been engaged in criminal activity. Therefore law enforcement had the justification necessary to conduct a Terry stop, a pat down, and the evidence obtained at this phase should not be suppressed under this theory.

C. Investigative Detention and Probable Cause

Defendant Swanson and the two other occupants were then taken to the Alton Police Department for interviews to be conducted by the FBI. Based upon all of the information law enforcement possessed, an

investigative detention was appropriate. The sole concern of the Court is the length of that investigative detention. That concern is mitigated, however, due to the fact that Defendant Swanson, the movant herein, was also clearly in custody based upon traffic violations issued by the Alton Police Department. Even if the investigative detention concerning the bank robbery would not have occurred, Defendant Swanson would not have been released because he was in custody on the traffic citations.

However, even if Defendant Swanson wasn't in custody on the traffic citations, the length of the investigative detention, in light of all of the facts and because three suspects were involved, the Court finds not to be unreasonable. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. Florida v. Royer, 460 U.S. 491, 500 (1983). The fact that multiple law enforcement agencies were involved, the fact that the three occupants had to be separately interviewed, the fact that the suspect vehicle was towed and the inventory search occurred, and the fact that law enforcement was required to have a certain evidence viewed by witnesses, all provide sufficient reasons for the length of the investigative detention herein.

At the Alton Police Department, after the interviews of Defendant,

Zollicoffer, and Walton,[2] wherein Walton confessed but wouldn't implicate his accomplice, probable cause to believe that Defendant Swanson and Walton committed the bank robbery, perfected, in the Court's opinion. Myron Zollicoffer clearly was not with Walton until later in the morning of January 6th.

The Government asserts that probable cause perfected at the traffic scene once additional information was obtained by law enforcement after the pat down search. However, because Defendant Swanson, the movant herein, was already "in custody" on the traffic offenses at the scene of the traffic stop, the Court sees little significance as to the actual timing when probable cause concerning the bank robbery perfected. As previously noted, Defendant Swanson, due to the traffic custodial situation, would have been transported back to the Alton Police Department for processing, booking, and eventually being taken to State Circuit Court.

D. Grand Jury Subpoena

Defendant complains of the lack of participation and lack of prior approval by the grand jury of the subpoena served upon him. Defendant relies on the First Circuit case, In Re: Melvin, 546 F.2d 1 (1st Cir., 1976). Defendant's reliance on Melvin is misplaced. Clearly, the case of United

[2] **Walton's interview concluded at 2:00 p.m.**

States v. Santucci, 674 F.2d 624 (7th Cir., 1982), controls herein. Santucci stands for the proposition that the U.S. Attorney's Office may fill in blank grand jury subpoenas without actual prior grand jury authorization, and that the U.S. Attorney's Office is allowed considerable leeway in attempting to prepare for a grand jury investigation. (Santucci at 627) Santucci also stands for the proposition that it is proper for a grand jury subpoena to provide that "the witness be given an option to provide the identification evidence outside the actual presence of the grand jury". (Santucci at 627.) It is noteworthy that the Santucci Court reviewed the Melvin decision and distinguished same.

At the Court's request, the Government was asked to supplement it's response to the Defendant's Motion to Suppress, and to provide any information concerning the propriety of a grand jury subpoena issued for saliva samples, as Defendant contended that the taking of saliva samples constituted a seizure requiring a showing of probable cause pursuant to the Fourth Amendment. The Court has reviewed the Government's response filed April 20, 2001, and the cases cited therein.[3] The Court agrees that a

[3] **The Government argues that by voluntarily complying with the subpoena and failing to challenge the validity of the items called for in the grand jury subpoena, Defendant Swanson has forfeited the right to contest the propriety of the subpoena's request for such items. Citing O'Ferrell v. United States, 32 F.Supp.2d 1293, 1394 (M.D. Ala. 1998) and Schwimmer v. United States, 232 F.2d 866 (8th Cir., 1956). The Government argues that prior to compliance, Defendant Swanson should have filed a**

case on point concerning saliva samples is In Re: Grand Jury Proceedings Involving Vickers, 38 F.Supp.2d 159 (D.N.H. 1998). Therein, in a well reasoned opinion, the Court ruled that a grand jury subpoena could be used to obtain saliva samples. The Court reached that conclusion after balancing the grand jury's legitimate interest in conducting a thorough investigation and obtaining relevant evidence against the subpoena recipient's Fourth Amendment rights. Id. at 165-66.

Under a time line analysis, the grand jury subpoena was authorized at or about 6:37 p.m. Prior to that time, law enforcement had been in communication with a representative of the U.S. Attorney's Office concerning the developments of the investigation. At the time that the grand jury subpoena was issued, this Court had already concluded that probable cause existed to believe that Defendant Swanson had committed the bank robbery at issue. The facts giving rise to this Court concluding that probable cause existed had been clearly communicated to the Asst. U.S. Attorney involved prior to the grand jury subpoena being issued. This Court acknowledges that an "independent" finding of probable cause or individualized suspicion had not occurred prior to the grand jury subpoena being authorized, nor had the grand jury met to hear the evidence available

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motion to quash the subpoena and not complied with same.

and vote to authorize the subpoena. However, these factors should not cause the suppression of the saliva sample evidence obtained by the grand jury subpoena in light of the authority cited above buttressed by the waiver or forfeiture argument footnoted above.

In Vickers, at page 167, the Court discussed the balancing test used when a motion to quash a grand jury subpoena for saliva sample is at issue. The Court indicated that a balance between the legitimate and protected privacy interest of the person subpoenaed against the grand jury's legitimate need to conduct its investigation and obtain evidence relevant to its inquiry and a possible criminal wrongdoing must be made. The Court outlined six areas to be reviewed:

1) Is the evidence plainly relevant to a legitimate and ongoing investigation being conducted by the grand jury;

2) Is the evidence described with sufficient particularity to notify the person precisely what is sought;

3) Is the evidence sought not to harass or to impose some burden because of their social or political views;

4) Could the evidence be probative in identifying or eliminating persons who may have participated in the crime under investigation;

5) Can the evidence be obtained with very minimal invasion of their

bodily integrity, i.e. by simply swabbing the inside of the mouth; and,

6) Can the evidence be obtained with no risk of physical pain, injury, or embarrassment, and with the most minimal personal inconvenience.

This Court agrees with the analysis from Vickers, and on balance, considering the six factors listed above, the grand jury subpoena is not unreasonable and would not be subject to an order to quash if one had been timely filed.

E. Inevitable Discovery

In the alternative, the Government argues that the saliva sample evidence, and the conclusions reached due to the examination of that saliva sample, and comparison to other evidence from the bank robbery, to be admissible pursuant to the inevitable discovery exception to the exclusionary rule. The Government argues that at some point in time, if a grand jury subpoena had not been issued on January 6, 2001, the U.S. Attorney's Office would have presented the matter to the grand jury for investigation, and would have sought an appropriate subpoena from the grand jury for Defendant Swanson to provide a sample of his saliva. The U.S. Attorney's Office submits it already possessed information sufficient to present to the grand jury to obtain the subpoena. The Court agrees. Under

either approach, law enforcement would have obtained the saliva sample from Defendant Swanson through a grand jury subpoena. Nix v. Williams, 467 U.S. 431, 449-50 (1984). The inevitable discovery exception to the exclusion rule applies in the instant case as an alternative basis to deny the suppression of Defendant's saliva sample.

F. Statements of Defendant

In the Defendant's Motion to Suppress and Supplemental Motion, the Defendant is requesting that statements made to law enforcement on January 6, 2001 be suppressed. Based upon the record herein, the Court respectfully disagrees. Not only were the requirements of Miranda meticulously followed, in this Court's opinion, no claim of duress or involuntariness has been shown, and in addition, no inculpatory statements were made by this Defendant.

IV. CONCLUSION

For these reasons, it is my recommendation that the Motion to Suppress (d/e 53) be denied.

The parties are advised that any objection to this Report and Recommendation must be filed in writing with the Clerk of the Court within ten working days after service of this Report and Recommendation. See Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to timely object will

constitute a waiver of objections on appeal. Video Views, Inc. v. Studio 21, Ltd., 797 F.2d 538, 539 (7th Cir. 1986). See also Local Rule 72.2.

ENTER: April 25, 2001

(Signature on File With Clerk)

BYRON G. CUDMORE
UNITED STATES MAGISTRATE JUDGE